U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 December 2006

BALCA Case No.: 2006-INA-18
ETA Case No.: P96-CA-54390

In the Matter of:

MDB, INC.,
Employer,

on behalf of

FRANCISCA GAN SY,
Alien.

Appearance: Andrew L. Fair, Esquire
New York, New York
For the Employer

Certifying Officer: Martin Rios and/or Rebecca Marsh Day[1]
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification in the above-captioned matter.[2]

[1] Rebecca Marsh Day issued the Notice of Findings and Final Determination. However, Martin Rios forwarded the case file to the Board of Alien Labor Certification Appeals.

[2] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of

STATEMENT OF THE CASE

On July 15, 1996, the Employer, MDB, Inc., filed an application for labor certification to enable the Alien, Francisca Gan Sy, to fill the position of "Export Coordinator/Agent," which was classified by the Job Service as "import/export agent" (AF 24). The job duties were stated to be:

> Coordinate activities of international traffic section of export agency and negotiate settlements between foreign and domestic shippers. Plan and direct flow of air and surface traffic moving to overseas destinations. Supervise workers engaged in receiving and shipping freight, documentation, waybilling, assessing charges, and collecting fees for shipments. Negotiate with domestic customers as intermediary for foreign customers, to resolve problems. Negotiate with foreign shipping interests to contract for reciprocal freight-handling agreements. Examine invoices and shipping manifests for conformity to tariff and customs regulations. Contact customs officials to effect release of incoming freight and resolve custom delays. Prepare reports of transactions to facilitate billing of shippers and foreign carriers.

(AF 24). The stated job requirements were two years of experience in the job offered or in the related occupation of "Loans/operations clerk for import/export operations." Other special requirements included: "Must be able to type 50 words per minute. Must speak Mandarin Chinese and Tagalog." (AF 24).

In a Notice of Findings ("NOF") issued on February 10, 1997, the CO proposed to deny certification on the grounds that the foreign language requirements are unduly restrictive under the provisions of 20 C.F.R. §656.21(b)(2)(i)(C). Accordingly, the CO instructed the Employer to justify that the foreign language requirements are based on business necessity, or delete such requirements (AF 14).

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the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted. We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

Under cover letter dated March 11, 1997, the Employer submitted its rebuttal to the NOF (AF 11-19). The CO found the rebuttal unpersuasive and issued a Final Determination ("FD"), dated March 27, 1997, denying certification. (AF 8-10). On April 16, 1997, the Employer filed a Request for Review (AF 2-7). However, the CO initially treated the request for review as a request for reconsideration, which the CO denied on April 30, 1997 (AF 1). By letter dated December 9, 2005, a new CO noted that this case was never sent to the Board of Alien Labor Certification Appeals ("the Board") for review. Subsequently, this case was received by the Board on January 25, 2006. Following the issuance of a "Notice of Docketing and Order Requiring Statement of Position or Legal Brief," dated February 6, 2006, the Employer resubmitted its prior argument under cover letter dated February 16, 2006.

DISCUSSION

In the FD, the CO summarized the NOF, Employer's rebuttal thereto, and her conclusion, stating, in pertinent part:

> A single issue was raised in the Notice which is the finding that the two required foreign languages are found restrictive, a violation of 20 CFR 656.21(b)(2)(i)(C). The employer was informed that unless the language requirements were documented by business necessity or other convincing documentation, the Mandarin Chinese and Tagalog language requirements were required in violation of the regulations cited. The Notice informed the employer that the only documentation which was forwarded were copies of telephone bills showing calls made to the Philippines and Singapore. Telephone bills are not considered adequate documentation because there is no way to tell whether the persons called speak some, little or no English, nor is there any way to tell if the recipients of the calls speak Tagalog and/or Mandarin Chinese along with English.
>
> The employer was given the remedy to show that the job requirements must be based on business necessity and cannot be merely for the convenience and personal preference of the employer. The employer was to demonstrate that the language requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job duties.
>
> In rebuttal, the employer responded as follows: "We would like to point out that from the telephone bills submitted in support of our language requirements, we made a total of 354 calls to countries where either Tagalog or Mandarin is the

native language…This high overseas calls volume is partly because we have a very difficult time communicating with our import companies in these countries because they speak such poor English. In fact, we often have serious miscommunications which require repeated telephone calls and faxes which try to correct them. It is problems such as these which have hindered this company's expansion in these markets and prevented us from increasing our exports of American products."

"One of the primary reasons we have required all applicants interested in the position of Export Coordinator/Agent to speak Tagalog and Mandarin is to prevent the delays, misunderstandings and mistakes…Even more importantly, we wish to expand our export business with these countries…[I]f we are to successfully compete in these countries, it becomes a business necessity to hire someone who speaks at least two of the most important languages needed for our business to communicate with our overseas importers."

"…[I]t is also relevant that for export/import companies in our gross sales range, it is a common practice to require export coordinators/agents to possess special language skills since experience has shown that such skills do, if properly utilized, lead to increased efficiency, productivity and overall business. It is for all the above reasons that we have required applicants for this position to meet specific language requirements and why those requirements are a business necessity."

Conclusions

The employer forwarded narrative statements in an attempt to justify the requirement for fluency in Tagalog and Mandarin Chinese languages. No further actual documentation, in the form of business documents, was forwarded in rebuttal. Furthermore, the rebuttal deals with projected needs of the employer to compete in the Far East. Labor certification can only be granted based on the current needs and conditions of an employer. No actual documentation has been forwarded to show immediate needs of the employer which would justify fluency in Mandarin Chinese and Tagalog languages. Based on these findings, labor certification is denied.

(AF 9-10).

On appeal, the Employer contends: (1) the telephone bills which had been submitted prior to the NOF constituted the "best evidence" that these foreign languages were used, and it is unreasonable to request additional documentation to substantiate that the people who answered those phone calls had difficulty speaking English and/or could only speak Mandarin Chinese and Tagalog; (2) the statements in the Employer's rebuttal

letter indicate that that the requirement of these foreign languages arises from business necessity; and, (3) the CO's assertion that the language requirements are not based on a projected need is incorrect, because the need to continue to expand the Employer's business is a current need, which requires these two foreign languages (AF 1-2).

It is well settled that an NOF does not have to be a detailed guide on how to achieve labor certification, but merely must put an employer on notice of the reason for the proposed denial of certification. In the present case, the NOF did not provide specific instructions regarding the type of documentation required to establish business necessity. However, it specified the grounds for the proposed denial and directed the Employer to document the business necessity for the foreign language requirements, without being misleading or ambiguous. *Cf., Miaofu Cao*, 1994-INA-00053 (Mar. 14, 1996)(en banc).

As set forth above, the ETA 750A reveals that the duties of the job opportunity entail extensive documentation (AF 24). Rather than submit relevant documentation, such as settlements, contracts, invoices, freight-handling agreements, reports, and correspondence which might document the business necessity for the Mandarin Chinese and Tagalog languages, the Employer's limited its rebuttal to a letter by its President, with assertions supported only by the documentation of telephone calls to countries where Tagalog and Mandarin is commonly spoken. Such documentation is suggestive that those languages are used in the Employer's business, but falls well short of proving such. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc) (a bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof).

In view of the foregoing, we agree with the CO's determination that Employer has failed to adequately document the business necessity for the Chinese Mandarin and Tagalog languages, as provided in §656.21(b)(2)(i)(C). Accordingly, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.